Filed 8/16/10 P. v. ramirez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BERNARDO PEREZ RAMIREZ, Defendant and Appellant.	2d Crim. No. B216625 (Super. Ct. No. 1284150) (Santa Barbara County)

Bernardo Perez Ramirez appeals his conviction by jury of aggravated sexual assault of a child under the age of 14 by forcible sexual penetration (count 1: Pen. Code, §§ 269, subd. (a)(5); 289. subd. (a)(1))[1] and four counts of lewd conduct on a child (counts 2-5; § 288, subd. (a)). The trial court sentenced appellant to 27 years to life state prison.[2] We affirm.

---

[1] All statutory references are to the Penal Code unless otherwise stated.

[2] Appellant was sentenced to 15 years to life on count 1 for aggravated sexual assault by forcible sexual penetration (§ 269, subd. (a)(5)). On counts 2 through 5 for lewd conduct, the trial court sentenced appellant to the mid-term of six years (count 2; § 288, subd. (a)) plus three consecutive two-year terms (one-third the midterm), for an aggregate term of 12 years to be served before the 15-year-to-life indeterminate term.

Facts and Procedural History

In August 2007, appellant (age 30) approached 12-year-old Jane Doe and gave her a piece of paper with his name and phone number. Appellant told Jane to call him. Jane did so several times. She told appellant that she was 12 years old. Appellant said, "You're small for your age. It doesn't matter; love doesn't have age." Appellant asked Jane to be his girlfriend.

Count 4: Lewd Conduct

In September 2007, appellant met Jane behind her apartment and hugged and kissed her.

Count 1: Aggravated Sexual Assault; Forcible Digital Penetration

In October 2007, appellant took Jane to his house. He kissed Jane's mouth and neck and grabbed her buttocks. Jane told appellant to to leave her alone. Appellant said that her your buttocks are "already mine" and "I know you like me touching your butt." Jane told him "No."

Appellant threw Jane on a bed and got on top and held her down. Jane tried to resist but appellant held her hands over her head and rubbed her vagina. Jane pushed and kicked and pled with appellant to "just stop. I don't want you to do that to me." Appellant used his legs and hands to hold Jane down and said, "Your vagina is already mine. I'm going to have it no matter what."

Appellant inserted his finger into Jane's vagina. Jane protested that it hurt, but appellant laughed and moved his finger in and out for a minute or two. Jane pled with appellant to stop and had to bite appellant on the cheek to get him to stop.

Counts 2 and 5/Lewd Conduct; Sexual Intercourse

In December 2007, appellant drove Jane to his house and asked if she wanted to watch a porno movie. Appellant kissed Jane and threw her on a bed. Jane told appellant "I don't want to do it " Appellant said "I already felt your vagina" and asked Jane to take off her clothes. She did so.

Using a condom, appellant had sexual intercourse with Jane for 20 or 30 minutes. Jane testified that they had sexual intercourse five or six times and drove to

Avila Beach. Appellant became concerned that Jane's parents had "already called the cops on me." Driving back to Santa Maria, appellant dropped Jane off in an alley by a relative's house at 11:30 p.m.

Count 3: Lewd Conduct; Sexual Intercourse

In June 2008, appellant took Jane, who had just turned 13, to his house. Appellant pushed Jane down on a bed, got on top and said, "We had sex already. So everything of your body is mine." Holding Jane tightly by the neck, appellant had sexual intercourse and took her tank top. Smelling and kissing it, appellant said, "Now I have something about you that I'm going to remember about when I was with you and you were my girlfriend."

Appellant's Statement to the Police

On July 28, 2008 Jane told the Santa Maria Police about appellant's sexual activities. Jane made a recorded phone call and agreed to meet appellant. When appellant arrived, he was arrested.

Waiving his *Miranda* rights (*Miranda v. Arizona* (1996) 384 U.S. 436 [16 L.Ed.2d 694]), appellant denied having sex with Jane. As a ruse to elicit a confession, Detective Paul Van Meel told appellant that Jane was pregnant and put appellant in a holding cell. A few minutes later, appellant told Detective Van Meel that "I accept everything" and that he had sexual intercourse with Jane twice. Appellant claimed that Jane was 14 years old and, had he known that she was 12 years old, he would not have had sex with her.

Prior Sexual Offense Evidence

Appellant had a sexual relationship with Jane's cousin, Estelle M., when Estelle was 16 years old. (Evid. Code, §§ 1101, subd. (b); 1108.) Appellant grabbed and kissed Estelle in his car. Estelle tried to push him away but appellant was too strong. Appellant tried to remove Estelle's shirt, grabbed her thigh, and forcibly kissed her on the mouth. He warned her that something bad would happen if she told anyone.

Appellant scared Estelle into being his girlfriend a few days later. When appellant learned that Estelle went to the fair with a 19 year-old-boy, appellant became jealous, grabbed Estelle and kissed her with such force that it bloodied her lips.

Several weeks later, appellant followed Estelle on her way to school, and demanded that she get in his car and go to his house. Estelle skipped school and had sexual intercourse with appellant several times. Estelle testified that "The first time I did it with him I didn't want to or anything; he forced me to do it"

At trial, appellant admitted having sex with Jane but claimed that it was consensual. Appellant told the jury that he was admitting counts 2, 3, and 5 for lewd conduct. On count 1 for aggravated sexual assault, appellant argued there was "no force. This case is all about force; that's what it comes down to."

Requisite Force For Aggravated Sexual Assault of a Child

Appellant argues that the CALCRIM 1045 instruction on count 1 for aggravated sexual assault fails to define the requisite force to convict for forcible sexual penetration.[3] (§289, subd. (a)(1).) The jury was instructed that the prosecution had to prove "[t]he defendant accomplished the act by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to anyone." The instruction states: "An act is *accomplished by force* if a person uses enough force to overcome the other person's will."

Citing *People v. Cicero* (1984) 157 Cal.App.3d 465 (*Cicero*), appellant argues that the trial court erred in not sua sponte instructing that "force" has a special meaning and must be "substantially different from or substantially greater" than that necessary to accomplish the sexual penetration. (*Id.*, at p. 474.) In *Cicero*, defendant

---

[3] The CALCRIM 1045 instruction states in pertinent part: "The defendant is charged in Count 1 with aggravated sexual assault based on the underlying crime of sexual penetration by force in violation of Penal Code section 289(a). [¶] To prove that defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act of sexual penetration with another person; [¶] 2. The penetration was accomplished by using a foreign object or unknown object; [¶] 3. The other person did not consent to the act; [¶] AND [¶] 4. The defendant accomplished the act by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to anyone."

was convicted of forcible lewd conduct after he picked up and carried two girls with his hand on their crotches. The *Cicero* court focused on the distinction between non-forcible lewd acts on a minor (§ 288, subd. (a)) and forcible lewd acts proscribed by section 288, subdivision (b) (now subdivision (b)(1)) which carries a greater punishment. (*Id*., at p. 473.) It concluded that "in cases where 'force' is charged under [section 288,] subdivision (b), and the People pursue a theory that physical force was used on a child, and the child is not physically harmed, it is incumbent upon the People to prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself. [Citation.]" (*Id*., at p. 474, fn. omitted.)

In *People v. Griffin* (2004) 33 Cal.4th 1015, our Supreme Court held that *Cicero* did not apply to forcible rape (§ 261, subd. (a)(1)). (*Id*., at p. 1026.) "There is considerable difference between the crime of lewd acts by force on a child under the age of 14, with which *Cicero* was directly concerned [citation], and the crime of forcible rape. Section 288 is broken down into two subdivisions and proscribes very different conduct than that which constitutes forcible rape under section 261, subdivision (a)(2)." (*Ibid.*)

The *Griffin* court held that the trial court was not required to give a *Cicero* instruction specially defining force. *(People v. Griffin, supra,* 33 Cal.4th at p. 1028.) "The question for the jury in this case was simply whether defendant used force to accomplish intercourse with Latasha against her will, not whether the force he used overcame Latasha's physical strength or ability to resist him." (*Ibid.*)

Adopting the reasoning in *Griffin,* the Third District Court of Appeal in *People v. Guido* (2005) 125 Cal.App.4th 566 held that the requisite force for aggravated assault of a child by rape or forcible oral copulation (§ 269, subds. (a)(1), (a)(4)) is that force sufficient overcome the victim's will. (*Id*., at p. 575-576.) The *Guido* court concluded that the term "force" does not have a specialized legal meaning. (*Id*., at p. 576.) "As with forcible rape, the gravamen of the crime of forcible oral copulation is a sexual act accomplished against the victim's will by means of force . . . ." (*Ibid.)*

In *In re Asencio* (2008) 166 Cal.App.4th 1195, Division Seven of this district, distinguished *Cicero* on the ground that "decisional law makes clear that the definition of the word 'force' in sexual offense statutes depends on the offense involved." (*Id*., at p. 1200.) Citing *Griffin* and *Guido*, the *Asencio* court held that aggravated sexual assault of a child by forcible sexual penetration (§ 269, subd. (a)(5); § 289, subd. (a)(1)) does not require physical force substantially greater than that amount of force sufficient to overcome the victim's will and accomplish the sexual penetration. (*Id*., at p. 1205.) "Because . . . the forcible sexual penetration statute is conceptually akin to the rape statute, we discern no reasoned basis to apply a different concept of the term 'force' to forcible rape and forcible oral copulation on the one hand (per *Griffin* and *Guido*), and to forcible sexual penetration on the other. We conclude that forcible sexual penetration within the meaning of section 289, subdivision (a)(1) is proven when a jury finds beyond a reasonable doubt that the defendant accomplished an act of sexual penetration by the use of force sufficient to overcome the victim's will. [Citations.]" (*Ibid.*)

We agree with *Asencio*. Based on the reasoning articulated in *Griffin, Guido*, and *Asencio*, we conclude that the amount of force necessary to commit the offense of aggravated sexual assault of a child by forcible sexual penetration is that force which is sufficient to overcome the victim's will and accomplish the sexual penetration. (*In re Asencio*, *supra*, 166 Cal.App.4th at p. 1200.) The trial court had no sua sponte duty to give a *Cicero* instruction redefining the term "force." (*Griffin*, *supra*, 33 Cal.4th at p. 1028; *Guido*, *supra*, 125 Cal.App.4th at p 576.) The cases cited by appellant are not controlling and are pre-*Griffin* cases or cases that make a passing reference to *Cicero* on other grounds. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 16 [ample evidence of duress mooted issue of whether sufficient force used]; *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004 [citing *People v. Cochran*, *supra*, 103 Cal.App.4th 8 as to sufficiency of evidence; no discussion of whether *Cicero* instruction required]; *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1240-1241 [forcible lewd conduct conviction; sufficiency of evidence review].) None of the cases disapprove of *Asencio* or hold that a *Cicero* instruction must be given sua sponte given.

CALCRIM 1045 correctly instructs on all the elements of aggravated sexual assault of a child by forcible sexual penetration. Thus, appellant's claim of federal constitutional error must fail. (*People v. Avila* (2006) 38 Cal.4th 491, 596.) Appellant can not "transform a state-law issue into a federal one merely by asserting a violation of due process." (*Langford v. Day* (9th Cir. 1996) 110 F.3d 1380, 1389.) Appellant also claims that CALCRIM 1405 should be augmented to specially define the term "force." The trial court had no sua sponte duty to so instruct. In any event, this evidence was overwhelming and established forcible sexual penetration within the meaning of section 289, subdivision (a)(1).

Substantial Evidence

Based on *Cicero*, appellant argues that the evidence does not support the conviction for aggravated sexual assault by forcible sexual penetration. On review, we consider the evidence in a light most favorable to the judgment and presume the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Griffin, supra*, 33 Cal.4th at p. 1028.)

It is uncontroverted that appellant threw Jane on a bed and got on top of her. Jane tried to stop him, but appellant pinned her down with his hands and legs. Holding her hands over her head, appellant said "Your vagina is already mine. I'm going to have it no matter what."

Jane tried to resist by pushing and kicking, but appellant held her down and penetrated her vagina with his "whole finger." Jane told him "it's hurting" and pled for him to stop but appellant laughed and continued the sexual assault. Jane had to bite appellant to get him to stop.

Like *Griffin* and *Asencio*, appellant was considerably older and stronger than the victim and pinned the victim down. The force element was established by the act of grabbing, holding and restraining Jane to accomplish the sexual penetration against her will. Similar convictions have been affirmed based on less force. (*People v. Griffin, supra,* 33 Cal.4th at p. 1029 [holding victim's arms to floor to accomplish vagina penetration sufficient force]; *In re Asencio, supra,* 166 Cal.App.4th at pp. 1205-1206

[pulling down six-year-old's underpants and rolling on top of victim sufficient act of force]; *People v. Alvarez, supra,* 178 Cal.App.4th at p. 1005 [defendant resisted victim's attempt to push him away and held her "tight" and "hard" while digitally penetrating victim].)

The evidence supports the finding that appellant also accomplished the sexual penetration by duress.[4] Appellant was older, stronger, and controlled Jane in the confines of his bedroom. Duress can take the form of physically controlling the victim where, as here, the victim attempts to resist the sexual assault. (*People v. Cochran, supra,* 103 Cal.App.4th at p. 14.) "Physical control can create 'duress' without constituting 'force.' " (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.)

The evidence clearly supports the jury's determination that appellant used force and duress to overcome Jane and to accomplish a digital-vaginal penetration against her will. (*People v. Griffin, supra,* 33 Cal.4th at p. 1209; *Asencio, supra,* 166 Cal.App.4th at pp. 1205-1206.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

---

[4] The jury was instructed: "*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and her relationship to the defendant." (CALCRIM 1045.)

Jed Beebe, Judge

Superior Court County of Santa Barbara

Jennifer A Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Roberta A. Davis, Steven A. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.